

Reinstatement Waiver or Resignation from Employment

The State Compensation Insurance Fund (SCIF) has had an internal policy that its employees will not execute or provide waivers of reinstatement or resignations as part of a compromise and release (C&R) document. There has been some inconsistency on the part of the SCIF attorneys with regard to this issue which periodically makes providing the information below necessary.

The Master Agreement does not provide that the SCIF representatives represent the employer for the purpose of personnel issues. The following is information that has been distributed several times over the past few years and represents the status of this issue.

A waiver of reinstatement, or resignation from employment, is a personnel issue which must be executed by the employer. The separate reinstatement waiver or resignation language agreement is the responsibility of the employer, and is not the responsibility of the SCIF representative(s).

Question: Is it appropriate to include a reinstatement waiver or resignation language in the compromise and release papers of a workers' compensation claim?

Answer: No.

Question: Is it appropriate to resolve employment status prior to or at the time a workers' compensation claim is being settled?

Answer: Yes.

Question: How is employment status resolved amidst settlement of the workers' compensation claim?

Answer: The SCIF attorney will put the employer's legal department or other designated departmental representative in contact with the employee's attorney (applicant's attorney) to discuss resolution of employment status. The separate reinstatement waiver or resignation language agreement is the responsibility of the employer, and is not the responsibility of the SCIF representative(s).

Question: Can the employer be held in violation of LC 132a if reinstatement waivers or a resignation is drafted at the time a compromise and release (C&R) agreement is reached?

Answer: Courts have found that negotiating and agreeing to a reinstatement waiver or resignation is not in violation of LC 132a and such language has been

upheld by the State Personnel Board as enforceable. Whether the waiver or resignation is enforceable is largely depended on the employee having competent counsel and whether his/her rights being waived were adequately covered prior to signature.

Analysis:

Although it is appropriate to discuss resolution of an employee's employment status with his/her employer at the time of resolving his/her workers' compensation claim(s), any type of resignation or reinstatement waiver language must be a separate agreement from the C&R settlement of a workers' compensation claim.

In a situation where the applicant (injured employee) has been approved for disability retirement, the applicant has "mandatory reinstatement" rights to his/her prior civil service position. The right to return is contingent upon medical that supports that his/her medical condition has improved to the point where he/she can perform the substantial (essential) portions of his/her duties. The employer (department) cannot rely upon the settlement of the workers' compensation claims via C&R to cover this situation, or the situation where a disability retirement is pending and later denied by CalPERS.

These situations can and have been resolved by including settlement of the applicant's employment status via a waiver of reinstatement which specifies that the applicant is voluntarily waiving his/her rights to reinstatement if either his/her application for disability retirement is rejected, or later rescinded. The SPB in the Johnson mater, (1996) SPB Precedential Decision No. 96-03 and in the recent case of Carolyn Ortega, Case No. 02-4039 has upheld that an employee can in fact enter into a settlement of his/her reinstatement rights and in fact waive such rights. In the Ortega case, the applicant chose to tender a resignation in order to obtain a C&R settlement of her workers' compensation claim(s), and the language was upheld at the SPB.

The waiver or resignation language have led to legal challenges on the basis that the language is in violation of LC 132a which disallows discrimination against workers who are injured in the course and scope of their employment. Any employer who violates LC 132a is guilty of a misdemeanor and the applicant's compensation is increased by ½, not to exceed \$10,000 together with costs, expenses and entitlement to reinstatement and reimbursement for lost wages and work benefits caused by the act of the employer.

In the case of Parker V. WCAB, CSUS, 5 WCAB Rptr. 10,059 (02/05/03) it was found that the WCAB does have the discretion to order reinstatement per a LC 132a violation despite concurrent proceedings at the SPB. There is no "exhaustion of administrative remedies" defense under LC 132a for State employees.

TO: Injured Worker

FROM: Employer / Department

DATE:

RE: Reinstatement Waiver

I understand that it is disadvantageous for the Department of _____ to settle my workers' compensation case by way of compromise and release if the possibility remains that I might again become employed by this Department. I understand that I have alternatives to a compromise and release settlement, but I prefer this type of settlement. Upon my own initiative to induce the Department to make this lump sum settlement, and after consultation with my attorney(s), I voluntarily waive any rights to reinstatement or rehire, agree not to seek reinstatement with this employer, and agree not to reapply for employment within the Department of _____.

See *Dewayne Johnson v. Department of Corrections*, case no 33955 (CEB 5/96) and *Brown v. WCAB* (1988) 54 C.C.C. 3.

Applicant

Dated

Applicant's Attorney

Dated